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IN THE

Supreme Court of the United States

October Term, 1963

No. 568

ANGELO LOICANO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI

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Petitioner, Angelo Loicano, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above case (*sub nom. United States* v. *Bentvena, et al.*) on June 13, 1963.

The unusual lengthiness of this Petition is most earnestly regretted by Counsel. The Court's indulgence is prayed on the grounds of the monumental size of the record, the non-existence of an adequate printed appendix, and the importance of the human and legal issues presented.

Opinion Below

The opinion of the Court of Appeals is reported at 319 F. 2d 916.*

* Counsel made informal inquiry in the Office of the Clerk of this Court as to whether the printing of the lengthy opinion of the Court of Appeals might be dispensed with as an appendix to the instant peti-

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered June 13, 1963 (appendix hereto, *infra*). By order of June 25, 1963 the Court of Appeals extended petitioner's time for filing a petition for rehearing to July 15, 1963. A petition for rehearing was filed July 12, 1963, and it was denied August 19, 1963. By order of September 16, 1963, the Honorable Mr. Justice John M. Harlan extended the time within which petitioner may file a petition for writ of certiorari in this Court to and including October 18, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

In addition to the sheer question of whether there was so much as a scintilla of evidence to convict Petitioner of the narcotics conspiracy charges, a prime issue—or set of issues—arises from the denial of Petitioner's right to counsel at the narcotics trial combined with the prejudice to Petitioner from his having been compelled by the Trial Court to be "represented" by "assigned" counsel who was also the counsel "assigned" to the co-defendant Panico brothers. Petitioner came into Court on the morning of the day set for the commencement of the narcotics trial to discover that over the week-end (the trial was set for a Monday morning) his retained attorney, Mr. Cosentino, had suffered a heart attack; and the Panicos' retained attorney, Mr. Aronne, had been forced to trial in a State Court proceeding owing to the failure of the Federal Trial

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tion on the ground of financial hardship of the petitioner and in view of the fact that several of the previously filed petitions for certiorari in this same case do print the opinion. The Clerk's Office advised that reprinting of the opinion in this petition may be dispensed with, and that no written request or permission for such purpose is necessary.

Judge herein to instruct all counsel to hold themselves as "actually engaged"; whereupon the Federal Trial Judge herein, deeming *instanter* that he was faced with a deliberate effort to delay the trial, peremptorily assigned to the joint defense of the Panico brothers and Petitioner Loicano an attorney who happened to be present in the courtroom (Mr. Todaro) and who had no familiarity with the defense of those three defendants; and, as was shortly to become evident, the linking of Petitioner Loicano in the Jury's eyes together with Salvatore Panico (*via* their joint representation by a single attorney not chosen by either of them) was extremely harmful to Petitioner Loicano because Salvatore Panico's conduct in the trial, conduct which is claimed in the petition for certiorari in No. 633 and in Carmine Panico's certiorari petition herein to have been the conduct of an insane person, must almost inevitably have prejudiced the Jury against the defense as being conduct so grotesquely obnoxious as has perhaps seldom if ever been seen in an American courtroom. Furthermore, Petitioner Loicano himself firmly, but with unfailing politeness, made known to the Trial Judge from the outset of this disasterous "assignment" of joint trial counsel that he declined to accept the assignment—the Panico brothers likewise declined the assignment—with the result that vital parts of the trial took place without Petitioner Loicano's being represented *at all* by effective counsel. The questions presented are:

1. Was there even a scintilla of proof to establish Petitioner's alleged knowing participation in the narcotics conspiracy charged in the indictment, or, instead, was Petitioner, in a quite literal and outright sense, convicted solely upon "proofs" amounting to nothing more than innuendo and the emanative prejudicialities of associative "guilt"? In short, is this a "no-evidence" case within the meaning of *Thompson* v. *Louisville*, 362 U.S. 199?

2. Was the petitioner denied a fair trial of the distinct issue of his own guilt or innocence by reason of disruptive and prejudicial occurrences at the trial which were generated by the intrinsic vices of the "mass-conspiracy" trial method?

3. Was there sufficient evidence of petitioner's guilt for submission to the jury under the rule of reasonable doubt as properly administered, construed and applied? Was his guilt proved in accordance with such rule? And was his conviction in accordance with such rule?

4. Was petitioner denied a fair trial, and was his constitutional right to be represented by counsel of his own choice, denied, by reason of rulings and remarks of the Trial Court in connection with the circumstances of his representation by counsel during the entire course of the trial?

5. Was petitioner also denied his right to adequate and effective counsel by reason of the Trial Court's imposition upon him, against his will, of an assigned attorney (Mr. Todaro) whom the Court had also assigned to two other defendants whose interests conflicted with those of petitioner?

6. Was petitioner denied a fair trial by being deprived of exculpatory evidence when the Trial Court prohibited petitioner's co-defendant Salvatore Panico from taking the stand to testify in his own behalf?

7. Was petitioner denied a fair trial by reason of the overall circumstances at the trial arising from the abnormal conduct of his co-defendant Salvatore Panico and from the Trial Court's refusal to sever the latter?

8. Does the reversal by the Court of Appeals of the conviction of certain defendants who were named under an accompanying substantive count in the indictment, a count

under which there were received in evidence prodigious quantities of narcotics which would not have been admissible under the conspiracy count (which was the only count under which Petitioner Loicano was charged), point to the necessity of a new trial for Petitioner Loicano?

9. In view of the Government's concession in the Court of Appeals that Petitioner Loicano was the sole defendant in this trial as to whom possession of narcotics was not proved, did the failure of the Trial Judge to instruct the Jury in accordance with the rule of *United States* v. *Massiah*, 307 F. 2d 62, 71 (C.A. 2 1963) deny Petitioner Loicano a fair trial?

10. In view of this last-mentioned concession of the Government (which but reflected the actual state of the proofs), was Petitioner Loicano denied a fair trial by the instruction to the Jury which in effect told them that Loicano had actually received narcotics (a point which the Court of Appeals did not discuss in its opinion)?

11. Did the conspiracy proofs against Petitioner Loicano amounted at most only to proof of an entirely separate and distinct conspiracy which, moreover, was not even a "conspiracy" but merely an abortive overture to conspire?

12. Petitioner Loicano respectfully adopts, insofar as applicable to his case, the questions presented in the companion petitions for certiorari on behalf of the other defendant-petitioners in this case; and as to those of his above-stated questions which are not argued or are not fully argued in this Petition, he respectfully adopts the arguments in the companion petitions relative thereto.

Constitutional and Statutory Provisions Involved

The case involves the Fifth Amendment (due process of law) and the Sixth Amendment (right to counsel) of the United States Constitution. It also involves 21 U.S.C. §§173 and 174 (Narcotic offenses); and Rule 14, F.R. Cr. P. (relief from prejudicial joinder). We are advised that these provisions are printed in companion petitions herein.

Statement of the Case

1. Introductory

The judgment of the United States Court of Appeals for the Second Circuit here sought to be reviewed affirmed a final judgment (J368a-371a)* of the United States District

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* "J a" refers to th printed "Appellants' Joint Appendix" in the court below, nine extra copies of which are on file in this Court, we are informed, *per* the filing herein on behalf of petitioner Mancino, who was a co-defendant in the instant trial. The aforesaid Joint Appendix is not an appendix of trial testimony. The original stenographic minutes of the trial are cited herein by number of page without other designation. There are also on file in this Court, we are informed, *per* the filings herein on behalf of other petitioners, nine extra copies of a printed "Appendix For Defendant Angelo Loicano" which was filed in the Court below, and which contains portions of the trial testimony relevant to the instant petition. We cite the latter appendix herein as "Loicano App. ". Because of the close connection between certain of the certiorari issues for Loicano and for the companion petitioner Carmine Panico, we note that there are also on file in this Court, *per* the filing made on behalf of petitioner Salvatore Panico (a brother of petitioner Carmine Panico) in a separate case (no. 633, involving Salvatore's contempt conviction arising from the instant trial), nine extra copies of a printed "Appendix (Supplemental) On Behalf Of Appellants Carmine Panico and Salvatore Panico" which was filed in the Court below, and which contains portions of the trial testimony relevant to the instant petition. The latter printed Appendix for the Panicos is cited herein as "Panico App. ". The aforesaid petition of Salvatore Panico (No. 633) is still pending in this Court as an item of the October, 1962 Term which was not disposed of before the Court adjourned for the Summer of 1963. Finally, since we do not print as an appendix to this petition the opinion of the Court of Appeals (see last preceding footnote), we shall refer to that opinion as printed in the companion petition of Carmine Panico, and for such purpose we shall use the designation "App. C. Panico Pet. ".

Court For the Southern District of New York (Mac Mahon, D.J.), entered July 10, 1962, after a jury trial, convicting the petitioner Angelo Loicano under the single conspiracy count of an eight-count indictment (J115a) charging substantive offenses and conspiracy in violation of 21 U.S.C. §§173, 174. Severance of counts and defendants reduced the indictment for the instant trial to three counts—two substantive and one conspiracy. Loicano was at all times named only in the conspiracy count of this indictment. A prior trial resulted in a mistrial. In the instant trial petitioner Loicano was sentenced to twenty years (J358a). He is presently incarcerated serving his sentence.

The indictment and the trial herein were of the "mass conspiracy" type. The indictment charged twenty-nine persons as defendants and seven others as co-conspirators (J115a-124a). Of the twenty-nine named defendants, fourteen were tried in the instant trial, the others having been severed or being unavailable for trial (App. C. Panico Pet. 3a-4a). One of the fourteen trial defendants (Mari) was acquitted by the trial court; the other thirteen were convicted; three of these thirteen (Bentvena, Monastersky, Struzzieri) were convicted under both substantive and conspiracy counts; the remaining ten defendants, including Loicano, were convicted under the conspiracy count (*id*, 4a).

On appeal to the United States Court of Appeals for the Second Circuit the conviction of one defendant (Salvatore Panico) was reversed on the ground that he had been denied a fair trial by the Trial Court's refusal to permit him to take the stand to testify in his own behalf (*id*. 52a-57a). Also reversed were the convictions of the three defendants who had been named and convicted under the substantive counts (Bentvena, Monastersky, Struzzieri) on the ground,

principally, that hearsay testimony received under the conspiracy count had prejudiced their chance for a fair trial under the substantive counts (*id.* 66a-86a). The remaining nine convictions, including that of the petitioner Loicano, were affirmed (*id.* 88a).

Our principal object in this petition will be to summarize, in somewhat more than the usual detail, the testimony on which the case against Loicano was allowed to go to the Jury and on which he was convicted of conspiracy to violate the narcotic laws. The all-but prohibitive statistical hazards which face a party seeking entry into the certiorari forum of this Court even where, as here, indicatedly grave errors of law are present, oblige us to bring to the Court's attention the really disturbing status of the instant conviction record in point of its extraordinary factual insufficiencies not only under the rule of reasonable doubt but even when tested by the rule of the prosecution's burden to make out a *prima facie* case. We believe that the case against Loicano could not conceivably have been viewed by a Federal Trial Judge as adequate for submission to a jury, and that it could not have resulted in conviction by a jury, if Loicano in this trial had not been typically the victim of the "mass conspiracy" device with its well-known tendency to obliterate the distinct issues as to the factual guilt or innocence of individual defendants—especially in the virtual "witchcraft trial" atmosphere of the mass *narcotics* trial of the present day. And even these familiar features of prejudiciality would probably not have sufficed to have deprived Loicano of a directed verdict of acquittal if this particular mass conspiracy narcotics trial had not developed the nightmarish tensions and disruptions (see descriptions in the various companion petitions) which evidently led the Trial Court and the jury to conclude that

they were dealing with a pack of monsters and not with individual human defendants each of whom deserved distinct judicial consideration. The ways in which petitioner Loicano was swept up and destroyed in this whirlwind of associative prejudicialities—despite Loicano's having been himself just about the single most unoffending one of the victims*—will be described *infra*.

2. Introductory (continued): The Government's Theory of the "Conspiracy" as a Whole; the Interesting Fact that Loicano Fits Nowhere Into This "Theory".

The opinion of the Court below (App. C. Panico Pet. 4a-5a) summarizes as follows the Government's overall theory of the case:

> "Appellants, together with their co-defendants and co-conspirators were charged with a conspiracy to import large amounts of narcotic drugs into the United States from Canada, and to dilute and distribute these drugs after their importation. The principal government witness, Edward Lawton Smith, and other government witnesses, described in some detail the workings of the conspiracy and the functional division of labor within the organization. In skeleton outline the conspiracy consisted of a

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* The trial minutes at 9080-9083a, dealing with the mass-contempt proceedings into which Loicano likewise was swept up like a bit of chaff, portray plainly just how indiscriminate had become the impetus of associative condemnation in this trial; indeed, the Trial Judge himself, in sentencing Loicano for "contempt" said (9083):

> "The Court: Your conduct viewed in isolation might very well appear to be innocuous, but in the setting of this trial and in view of the clear warnings of the Court in advance of your outbursts and their open defiance of the Court's orders and their tendency to encourage others to do equally and worse acts and misconduct in this trial, the Court feels that you merit a sentence."

Then, sentencing Loicano to ten days for contempt, the Trial Judge, himself suddenly experiencing a twinge of judicial remorse, instantly added, "Wait a minute. I reduce that to five days. Five days. I correct the sentence." (9083)

group of Canadians, headed by Guiseppe "Pepe" Cotroni who handled the exportation of the drugs from Canada. Couriers brought the narcotics across the Canadian-United States border and into the New York metropolitan area. Members of the conspiracy manned centers in the New York metropolitan area where they received the drugs from the couriers and diluted and packaged them. Distributors finally disposed of the drugs through various selling outlets. Overall responsibility for the continuing operation rested in its "chief executive"; the appellant Carmine Galante."

We have set out the foregoing summary (as given by the Court below) of the Government's theory of the conspiracy as a whole, because, as intimated in our above sub-heading and as will be demonstrated in detail under subsequent headings in this Statement of the Case, the trial proofs never put Loicano anywhere into that picture of "conspiracy" as charged in the indictment.

As this Court will have gathered from its examination of the several companion petitions, there is a portion of the Government's theory of this case which was commonly spoken of in the trial and in the appeal below as the "route" or "run" phase of the alleged conspiracy, i.e., a route or series of alleged delivery points or "centers" to which defendant Mancino and the accomplice witness Smith used to deliver "wholesale" batches of narcotics allegedly obtained from the Canadian source. The functioning of this alleged Canadian source on a conspiratorial footing was another important part of the Government's theory. One of the "stops" on the Mancino-Smith "route" or "run" was "Rocco's On The Hill."* The entire "case" against

* The details of the pertinent testimony and the record citations are given *infra*.

Loicano, both as to the "route" aspect and the Canadian-importation aspect—these being the alleged areas of the conspiracy to which Loicano was sought to be linked—revolved around alleged happenings connected with "Rocco's On The Hill" and "Rocco" himself (defendant Sancinella, who was severed from this trial). It is therefore significant that Loicano was never proved to have had any connection whatever with "Rocco's On The Hill" or with "Rocco" except the purely associative alleged connection as a "partner" of "Rocco" (and this solely according to the words of the accomplice witness Smith, who never explained what "partner" meant); and that Loicano was never proved to have had any participation in the alleged Canadian importation, the most that was proved as to this being that Loicano knew of Smith's trips to Canada to bring back narcotics and that Loicano invited Smith to start a *new and separate* Canadian operation in competition with the existing conspiracy. The Government expressly stated in its brief in the Court below (p. 67) that Loicano is the only one of the numerous defendants in this trial as to whom possession of narcotics was not established; and, as we shall show, there is no other proof of Loicano's actual participation in the conspiracy charged in the indictment because, again, the alleged offer to Smith shows, at most, that Loicano knew of some kind of importation activity from Canada and was hoping to obtain a similar arrangement for himself (which the Government concedes was never consummated because Smith declined the alleged "offer").* As we also show *infra*, Smith admitted in this trial, in connection with his highly touted (by the Govern-

* We pass, as sufficiently treated in companion petitions, the issue of the inordinately base credibility of the accomplice witness Smith—source of the sole inculpating proof against Loicano, the Trial Court having charged the Jury that if they did not believe the testimony of Smith they must acquit Loicano (J.176a).

ment as well as by both of the Courts below) testimony of the "route" "stop" at "Rocco's On The Hill", that he (Smith) had never even entered that place, had never seen Loicano there, and in fact had no personal knowledge that this place was even one of the alleged "route-stops".

Notwithstanding this filament-thin tenuousness of the "proof" against Loicano, and notwithstanding the undisputed absence of any proof whatever that Loicano was ever actually a recipient of narcotics at "Rocco's", the Trial Judge charged the Jury (J157a) that at the place called "Rocco's On The Hill" "the Government contends, Rocco Sancinella and Angelo Loicano received narcotics from Mancino." This judicial announcement to the Jury that the Government contended there was proof that Loicano received narcotics had no slightest shred of foundation in the evidence—the Government itself having so conceded, but not until it wrote its brief in the Court of Appeals (*supra*). And although this portion of the charge to the Jury was excepted to (vigorously—J213a), the exception was unavailing; and likewise unavailing was Loicano's earnestly urged point of error on this ground in the Court below (Br. 7; Reply Br. 9; Pet. Reh. 4), that Court not having seen fit to mention the point in its opinion affirming the conviction, or in denying Loicano's petition for rehearing where this point and the Court's failure to mention it were tendered (Pet. Reh. 4).

At the further risk of taxing this Court's toleration for anticipatory forms of discussion in a "Statement of the Case" in a petition for certiorari, we close this Introductory with the following (all of which will be substantiated by our detailed factual recitals and record citations *infra*): —Our theme is that the judicial process broke down in this case with respect to Loicano; that Loicano did not receive

the benefit of *judicial* consideration of the question of his guilt of the criminal charges under which he has now been committed to durance for the probable remainder of his adult life; and that he did not receive this judicial consideration at the hands of either the Trial Judge or the Court below. We intend no disrespect to the Court below when we suggest that the individualized judicial consideration that Loicano deserved and needed was at best difficult for the Court below to accomplish in the face of the mountainous trial record in this mass conspiracy case.

One of the incidentally more fantastic incidents in this case over which some future historian of Federal Appellate mores may marvel is that the Court below found itself unable to allow more than a total of *ten minutes* for the oral argument of the appeal on the merits in Loicano's case —which ten minutes moreover had to be shared with another appellant (Sciremammano). For *five minutes*, then, the appellate pleader on Loicano's behalf was allowed to speak man-to-man to a Court of Appeals of the United States in a situation where what may have turned on those five minutes was twenty years of a man's life.

Throughout this case there has been too much rush, rush on the part of the prosecutors and of the Judges. Rush "like increase of appetite grows by what it feeds on." The Government's rush imparted itself even to the Court below —not to speak of the ramming methods in the trial itself, which we note in connection with the Sixth Amendment issue of the right to counsel *infra*.

The future legal historian whom we envisaged a moment ago may well wag his civilized head also over the discovery that this appeal in the Court below gives indications of having been administered by the appellate Panel, facing as it did the overwhelming magnitude of two trial records total-

ing nearly 30,000 pages, on the basis of unduly hearkening to the Government's theory of the case. Some extremely interesting textual parallels exist between the Government's brief in the Court below and the opinion of the Court below. We are assuredly not suggesting that there is anything improper in this, for if the Government's briefing of the case was right, the aid thereby given to the Court would properly be reflected in the Court's opinion. But the Government's brief in the Court below was not right, and we are asking this Court to see whether, in the all-but impossible conditions of the time-scheduling vis à vis the record-task, which this appeal involved, the constitutional right of Angelo Loicano to individualized judicial consideration of the distinct issue of his individual guilt or innocence was in effect determined by the Government's prestigious argumentation rather than by the trial record.

We realize how unusual it is for lawyers to ask a Court to see what is wrong with the other side's brief, rather than to see what is wrong with the other side's case or with the judgment appealed from. But we are convinced that justice for Angelo Loicano may decisively depend upon an unravelling of the appellate epistemology in the Court below, which in turn seems to us to require that the Government's argumentation be scrutinized.

3. The Trial Proofs as to Petitioner Loicano.

As mentioned, the trial Court instructed the Jury that if they did not believe the testimony of the accomplice witness Edward Lawton Smith they must acquit Loicano (J176a).

As one of the supposed "route-run" stops which he and Mancino are supposed to have been making during 1958 for the delivery of narcotics, Smith testified concerning a

place described by him as "Rocco's on the Hill". In his first mention of this place (1472), Smith said that Mancino told him, during one of the alleged "runs", that he had to go on and make a run "on the hill to Rocco". The next time that Smith mentioned this place, it was, again, merely to say that Mancino went to Rocco's on the Hill (1485). Smith's next item of testimony on this (1556-1560) was that a time came when Mancino introduced Smith to "Rocco and his partner Puggy", Smith saying that Rocco is the defendant Rocco Sancinella and that "Puggy" is the appellant Loicano. Smith said that on this occasion Rocco and Puggy sounded him out about making "runs" for them to Canada to obtain narcotics, and that Smith told them he was not interested (1559). Shortly after this, according to Smith, Mancino wanted to take Smith to Rocco's, saying that they wanted to talk to Smith, and Smith again said that he was not interested (1568-1569).

The foregoing, so far as we can glean from the massive record of the trial testimony, is the sum and substance of Smith's (and of the Government's) "evidence" relating to Loicano in this case. We argue *infra* that this was insufficient for submission to the jury on the question of Loicano's guilt of conspiracy; we shall refer also *infra* to certain other testimony by Smith relating to remarkably similar alleged offers that were made to Smith by other persons with first-names similar to Loicano's, who supposedly also wanted Smith to make narcotics "runs" for them to Canada and back—the inference being very compelling that Smith was at least confusing in his mind the alleged respective situations involved, if not fabricating both of them. *It is not too much to suggest that Loicano is now serving a 20-year sentence because Edward Lawton Smith made a slip of the tongue somewhere along the line and then felt he must stand by it.*

In his direct examination Smith had displayed an interesting proclivity, as we just intimated, for carelessly interchanging or misindentifying people and especially people's names, particularly the name "Angelo" or "Angie" (1581-1583). Several persons with the name "Angelo" or a similar name were involved in one way or another in the Government's allegations in this case. Therefore, it was the first object of Loicano's attorney in cross examining Simth to clarify that none of the persons to whom Smith referred by the name "Angelo" or "Angie" were the appellant Angelo Loicano, and Smith so admitted (2101-2102).

It also developed, in Smith's cross examination, that he had never referred to "Puggy" in any of his Grand Jury testimony, thereby suggesting that he had not referred to Loicano at all (2110-2112). Smith also admitted that in the prior trial he had interminglingly misidentified the defendants Loicano and Polizzano (2115, 2120-2121). Smith had apparently also misidentified Loicano with a defendant nicknamed "Bootsie" (2122-2124). On still another occasion, in the prior trial, Smith had applied the name "Puggy" (supposedly the name by which he knew Loicano) to the defendant Anthony DiPasqua (2125-2126, 2127-2128). This intermingling of Loicano with DiPasqua was especially serious because, as more fully appears *infra*, DiPasqua is one of the persons from whom Smith claims to have received the other above-mentioned offer to make Canadian "runs"—one of the two such alleged offers which we contend were either fabricated by Smith or unfoundedly attributed to Loicano as distinct from possible other defendants.

The Government stipulated that Smith had not mentioned Loicano's name at the Canadian rogatory interrogation in October 1959 (5065). See also 2142-2144.

Further as concerns Smith's earlier-described vague testimony about Mancino's telling him of "runs" that he (Mancino) was allegedly making by himself up to "Rocco's on the Hill", Smith made it clear on cross examination that he had never entered that place, and had never seen Loicano there (2146, 3171-3173).

Thus, the testimony is undisputed and unequivocal that Loicano was not placed by Smith into any guilty complicity with "Rocco" or any other person in the alleged receiving of deliveries of narcotics at the place called "Rocco's on the Hill"; and that Smith claimed to have had only one conversation with "Puggy" (allegedly Loicano), to wit, the alleged conversation in which Rocco and his "partner" Puggy asked Smith to make narcotic runs for them to Canada (see especially 2141).

By the most attenuated kind of "evidentiary" thread the Government tried to tie Loicano into the overall conspiracy—as distinct from any mere separate alleged conspiracy between Rocco, Puggy and Smith—through the medium of testimony concerning "Rocco" himself, i.e., testimony dealing with matters wholly separate from anything connected with Loicano. Thus, narcotic agent McDonnell testified that, in the course of surveillance of some of the defendants in the company of the alleged Canadian source of narcotics supply (C. roni), he saw Rocco Sancinella with them—Sancinella being the "Rocco" here in question (3444-3450). Also, the Court admitted in evidence Exhibit 102, which was a book of telephone numbers containing the number of a luncheonette in which Sancinella was allegedly a partner, this telephone book having been found on still another of the defendants (Indiviglio) with whom Loicano was never otherwise connected up. Moreover, this book was taken from Indiviglio upon his arrest

after the date of the handing down of the indictment herein. See 3723-3729, 3770-3777, 3782-3793. These utterly remote, immaterial and (in the case at least of the above mentioned telephone book) inadmissible alleged conspiratorial "linkages" between Loicano and Sancinella, and, through Sancinella, between Loicano and other alleged conspirators, were severely prejudicial to Loicano and should, of course, have been screened out of the proofs by the Trial Court. In any event, their remoteness and immateriality—even conceding their admissibility in point of other objections—can scarcely be considered to have given any authentic strength to the Government's jury case against Loicano. Yet they stayed in the "proofs", and their prejudiciality is obvious in a case such as this one, where the Government's "proofs" of conspiracy as to Loicano were so flimsy that any provocative or tendentious purported shoring-up of those "proofs" tends to have a jury effect far beyond or irrespective of its objective value.

4. The Course and Conduct of the Trial in Relation to Loicano's Representation by Counsel.

At the commencement of the pretrial proceedings (March 9, 1962) in the retrial of this indictment, it became evident that the Trial Judge was conditioned to react in a peremptory manner to any suggestions, no matter how urgent and no matter how reasonable, which might alter established arrangements as to representation by or assignments of counsel, if such alteration should in the slightest affect the scheduling of the trial (Pretrial, March 9, 1962, pp. 13-21).

This same conditioning or predisposition of the Trial Judge was to be manifested repeatedly at subsequent pretrial sessions (e.g., pre-trial March 12, 1962, pp. 42-44, 48-

52, 55-62; pre-trial March 15, 1962, pp. 78-101a, 150-153a; pre-trial March 25, 1962, pp. 341-343).

In the companion petition herein on behalf of Carmine Panico there is a detailed description of the events which led up to the impasse involving the Panicos' chosen trial counsel, Mr. Aronne. That impasse was climaxed, as fully told in the Panico petition, by the Trial Court's dragooning of Mr. Todaro as "assigned" counsel for both the Panico brothers defendants and the within petitioner Loicano. In order to see how these happenings specifically affected Loicano, it is necessary to expand upon the treatment of this subject contained in the Carmine Panico petition. And, because there is unfortunately not available any one systematic printed appendix of the pretrial and trial proceedings relating to this subject, we are obliged to quote extensively from the testimony, which we hope this Court will indulge despite the burdensomeness involved since the point is one of constitutional right and the unwieldiness of the trial record has already proven what a curse that record can exert upon a defendant's just interests in this case.

For the second (and instant) trial of this indictment Loicano had retained Sylvester Cosentino as his attorney. Mr. Cosentino had been Loicano's attorney at the prior trial which terminated in a mistrial, and he was fully familiar with Loicano's case.

Mr. Cosentino was present or "covered" at every single one of the several pre-trial proceedings which were had in preparation for the second trial of this case. At the pre-trial on March 9, 1962 (pp. 30-32) Mr. Cosentino apprised the Court privately that he had a cardiac condition and he requested that the forthcoming trial be scheduled for between the hours of 10:00 a.m. to 4:00 p.m. daily, instead

of 10:00 to 5:00, but the Court refused. On the morning of April 2, 1962, at the final pre-trial session (the trial itself was to commence on that same morning), it became known that Mr. Cosentino was ill (he was hospitalized with a heart attack). There then ensued a remarkable arrangement, laid down by the Trial Court, for the substitution, assignment and coverage of counsel for the trial which was about to begin. The happenings to which we refer are set forth at pp. 598 to 620a of the pre-trial transcript of April 2, 1962. It there appears that two other defendants, Carmine and Salvatore Panico, who were represented by Mr. Aronne, were also momentarily without counsel because of the absence (entirely proper—see the Petition for Carmine Panico) of Mr. Aronne. Attorney George Todaro happened to be present at the pre-trial meeting in question, because he had just arranged to withdraw from the representation of another defendant, having been substituted for by another attorney. Mr. Todaro, in short, was in the process of withdrawing from the case, and from the courtroom, when he was in effect nabbed (if we may so express it) by Judge MacMahon and directed to take over the representation of Mr. Aronne's clients (the Panicos). In addition, the Trial Court also directed Mr. Todaro to take over the representation of the absent Mr. Cosentino's client, Loicano. The Court was advised that Loicano wanted Mr. Cosentino, who had been his attorney throughout the other trial and whom he had retained and partially paid for this trial (pretrial, April 2, 1962, p. 601). Right after the Court had "assigned" Mr. Todaro to represent Loicano and the Panicos, the following occurred (*id.* 603):

> "Mr. Todaro: Your Honor, don't you think we need the consent of the defendants?
>
> The Court: No, I don't think so.
>
> Mr. Todaro: It seems to me that, if the defendants

don't want me as their counsel, I know nothing about their case, then they are not being properly represented.

The Court: Well, I think they are. You are familiar with the case, and I am assigning you to represent them until such time as Mr. Cosentino and Mr. Arrone come back here."

A few moments later Mr. Todaro again attempted to reason with the Court, who thereupon railed at Mr. Todaro that "You wouldn't cooperate" (*id.* 606).

A few moments further on in the proceedings the Court directed that an investigation be made of the physical condition of defendant Loicano's lawyer, Mr. Cosentino, who, the Court had now been advised, was in the hospital with a heart attack (*id.* 609). A little farther on, Mr. Todaro again obtained the Court's attention and asked whether the Court was going to interrogate Loicano and the Panicos as to whether they wanted him to represent them, to which the Court replied "No, I am not. I assigned you to defend them" (*id.* 611). However, after having thus twice brushed aside Mr. Todaro's proper request that the clients be so interrogated, the Court itself apparently thought better of its impulsive action on this and imperturbably reversed itself, directing that Loicano and the Panicos be brought before the Court for questioning along such lines (*id.* 615). This interrogation and accompanying colloquy, as relating to Loicano, deserve to be quoted in full (*id.* 616-619):

"The Court * * *

Mr. Loicano, your lawyer suddenly came down with a heart attack this morning, I am informed, and is in the hospital. The Court has not had an opportunity to investigate into what Mr. Cosentino's condition is, received no advance notice of it. Were you advised of it before this morning?

Defendant Loicano: No, sir.

The Court: I have asked other counsel in the case to represent you pending Mr. Cosentino's return to this case to represent you, and I am advised that you refuse to consent to that.

Defendant Loicano: Well, your Honor, Mr. Cosentino was five months on trial with me before and I believe he done very good work for me at the last trial, and I don't see how I can go along with another lawyer until we find out, at least, what is wrong with him.

The Court: You refuse to consent to having some other lawyer in the case represent you.

Defendant Loicano: Yes, sir.

The Court: In that case the Court assigns Mr. Todaro to represent you until Mr. Cosentino returns.

Mr. Todaro: May I ask, your Honor—

The Court: Just a moment, please.

Do you consent to that?

Defendant Loicano: No, your Honor, I don't consent to that because I don't know if Mr. Cosentino is coming back.

The Court: I will assign Mr. Todaro.

Defendant Loicano: And I want a lawyer of my own choosing.

Mr. Todaro: Your Honor, this presents a problem. Supposing Mr. Cosentino is hospitalized for months? Suppose that something unfortunate happens to him? I think this man is entitled to representation by a counsel of his own choice.

The Court: He has had this opportunity. Mr. Consentino has had a heart condition for some time. This defendant knows that, and he willingly accepted that risk, and I am assigning you, Mr. Todaro.

Defendant Loicano: That is Mr. Cosentino's responsibility.

Mr. Todaro: He represented Mr. Loicano for five months at the last trial. We cannot foresee the future.

The Court: Neither can I, so I am assigning you. Any other motions?

Mr. Tendy: No, sir.

Mr. Todaro: May I add for the record that I have been instructed not to participate, so I will remain mute throughout the trial.

The Court: That is your choice. I am instructing you to represent these defendants to the best of your ability under penalty of contempt of court."

Immediately following the above-described pre-trial proceedings of the morning of April 2, 1962, Judge MacMahon called the retrial of the within indictment.

At the very outset of the trial—upon the calling of the roll of the defendants—it should have become apparent to the Trial Judge that the impasse which his above described incredible actions had portended, was already in being. When the name of Angelo Loicano was called in the roll of the defendants, the following took place (3-4):

"Mr. Todaro: Your Honor has assigned me to this case and I have been instructed again by Mr. Loicano not to participate. I feel, with all due deference to your Honor, and most respectfully, that in the interest of the client, Mr. Loicano, whom you have assigned me to represent it would serve his best interest for me not to participate and to remain mute.

The Court: Mr. Todaro, the Court has assigned you to represent these defendants to the best of your ability, and I direct you to do so.

Mr. Todaro: Yes, sir. To the best of my ability his interests would best be served by my non-participation.

The Court: The Court does not agree with that. You have much greater ability and a familiarity with this case. I direct you to participate in this trial.

Mr. Todaro: I must respect the wishes and instructions of my client.

The Court: I direct you to participate in this trial, Mr. Todaro. Are you ready?

Mr. Todaro: I am not ready. This is a position that is really embarrassing to me, being forced to accept clients who do not want me. I say a defendant is entitled to a fair and impartial trial and to be represented by counsel of his own choice. He has made his choice. Unfortunately this lawyer is in the hospital with a heart condition. He paid this lawyer a fee and he is entitled to representation by this lawyer.

The Court: I direct you to represent him until his lawyer returns to the trial.

Proceed."

The Trial Judge did not refrain from questionable gambits aimed at averting the stalemate—which the Judge had himself created—of the defendants' preference to exercise their constitutional right to counsel of their own choosing. As the selection of a jury was commencing, the following occurred (36-37, 38-39):

"(At this point defense counsel left the courtroom to confer.)

(The following occurred at the bench, out of the hearing of the prospective jurors:)

The Court: I want the record to note that Mr. Todaro went with other counsel on the business of challenging the jury."

* * * * *

"Mr. Todaro: Your Honor, may the record show that I did not participate in the selection of the jury? I attended merely physically, and that is in behalf of Loicano and in behalf of the Panicos.

The Court: The record will show that you were physically present.

Mr. Todaro: Physically present, yes, sir.

The Court: With other counsel in their consultation.

Mr. Todaro: Your Honor, I specifically mentioned to my colleagues that I was not participating, that they could do what they pleased, and I was not interested in what was going on."

A similar gambit by the Trial Judge occurred a few minutes later, when defense counsel left the courtroom to confer, and the Court said "Mr. Todaro, I direct you to go into that room"—"Whereupon Mr. Todaro left the courtroom" (50).

The work of selecting a jury continued through the morning of the first day of the trial (April 2, 1962), and at the outset of the afternoon session an application was made to the Court, on behalf of all defense counsel, for an adjournment of the trial or for a mistrial in the event that the adjournment were refused, "Upon the ground that three of the defendants are not presently represented by counsel of their own choosing. And since the charge contained herein is one of conspiracy, each of the defendants' interests would be damaged and impaired if the trial were to proceed where three defendants are not represented by their own counsel because, if they are inadequately or improperly represented, it must reflect upon all of the other defendants" (53). The application was denied.

A little farther on, when the Court denied a certain motion for mistrial, the following occurred (69-70):

"Mr. Todaro: In view of my position, I am not taking part in this motion.

The Court: I direct you to join in the motion for your clients.

Mr. Todaro: If your Honor directs me I will do so because of your Honor's direction, but not of my own volition. I don't think my clients are being protected properly. I have a right—

The Court: I direct you to join in the motion.

Mr. Todaro: Pursuant to the direction, I will do so.

Defendant Loicano: Your Honor, this man is not representing me.

The Court: He is representing you.

Defendant Loicano: No, he is not."

Right after this the Court turned to the panel of prospective jurors and said (70):

> "Again, I ask you all to disregard the remarks made by the defendant Loicano who is represented by an able lawyer, who was assigned to the case for him."

As the trial went forward on that first day Mr. Todaro continued unwaveringly to adhere to the wishes of the defendants to whom he had been imperatively assigned, that he had no authority to participate in the trial on their behalf (109, 116-117). As the Court kept pressing Mr. Todaro with direct orders to participate the following occurred (119-120):

> "Mr. Todaro: For the record, your Honor. I want to clarify the record. Your Honor has ordered me to participate in this case. How in heaven's name can I participate if I don't know anything about the case * * * ?"
>
> * * * * *
>
> "Mr. Todaro: * * * "
>
> May I say this, though, for the record. Your Honor has assigned me to be the advocate. I think it is my right to determine that which is for the best interests of my clients, therefore, as an advocate, I think the best interests of my clients will be served by my non-participation.
>
> The Court: For the best interests of your clients I direct you to participate in this trial to the best of

your ability, under penalty of contempt, and I hope you don't force me to do it."

Scarcely had the echoes of the above-quoted exchange died away, when, seconds later, as defense counsel left the courtroom to confer, the Court returned to its previously noted gambit and said "Mr. Todaro, get in the ballgame" (121).

Minutes later defendant Salvatore Panico had an emotional outburst, and the following occurred (out of the hearing of the Jury) (124-125):

"Mr. Todaro: I am in a terrible position, I don't know what to do.

The Court: It is a put up job right in front of my eyes. I am not going to let you or them get away with it.

Mr. Todaro: Your Honor is implying something toward me which is unwarranted. I came here yesterday to withdraw because other attorneys had taken over my clients. I asked your Honor to relieve me of the assignment and you thrust me with three other clients whom I know nothing about. I am supposed to prepare the case without preparations, try a case without preparation. They are hostile clients who do not want me and never have wanted me. * * *

The Court: Mr. Todaro, I have directed you. I am quite aware of your position. But I am directing you as an officer of this court to get in there and defend these defendants to the best of your ability.

Mr. Todaro: Without any knowledge of the facts?

The Court: If there is any more of this uncooperativeness on your part with the Court's direction and its assignment to you, I tell you now I will be forced to resort to contempt.

Mr. Todaro: I respectfully move for a mistrial, and I must respectfully ask for a mistrial on the

ground that your Honor is obviously prejudiced toward me and toward my clients that will inure to their detriment, that they are not getting their constitutional rights, that they have to have a lawyer of their own choice, and I am being thrust upon them when they don't want me. They are right. They paid their attorneys and they have legal excuses and your Honor is forcing me into a situation which is intolerable to me as a lawyer.

The Court: Your motion for a mistrial is denied. You are directed to continue with the assignment the Court gave you."

The selection of the jury having been completed (1-161) without opportunity for the Panico defendants and defendant Loicano to participate therein through counsel of their own choosing—and the counsel whom the Court had forced upon them having declined to participate at the insistence of those defendants—and the next order of the business of the trial being the openings, the following occurred (164):

"Mr. Todaro: I don't expect to open.

The Court: You waive the right?

Mr. Todaro: Yes. Sure. My clients have instructed me not to open. They have refused to give me the facts."

At the close of the morning session on the second day of the trial (April 3, 1962)—the next order of business being the Government's opening—the Panico defendants and Loicano made an unavailing effort to explain their position to the Court in an amicable and sincere spirit. This passage in the trial minutes is set out in full in the Panico "Supplemental Printed Appendix" (16a-19a). We quote the portion involving Loicano (192-193a):

"Defendant Loicano: Your Honor, before we go, Mr. Tendy is here. He knows my conduct in the last

trial. I don't think he could say anything was wrong about me.

Defendant Carmine Panico: I think Mr. Tendy could vouch for all of us.

Defendant Loicano: Mr. Cosentino, I believe, done a very good job for me, defending me as an attorney. All I asked for yesterday was to at least find out what is wrong with him. That is all I asked for.

The Court: The Court is attempting to find out what happened to him. What have you learned, Mr. Tendy?

Mr. Tendy: Doctor—

Defendant Loicano: I went to see him last night myself, your Honor, because I have a personal relationship with him. I grew up with him, so I know the man very well. I don't want to see him in the hospital. He knows that. I never want to see anything happen to Mr. Cosentino because I was brought up with the man. The man is a personal friend of mine. We lived next door to one another.

It isn't a question that I want to see him in the hospital or I want to see him get a heart attack. I mean, I don't want to see him sick or anything like that. I just want to see him in court to defend me, that's all.

And, with all due respect to you, I think I should have had a lawyer of my own choosing, at least wait a day until I could talk to a lawyer.

The Court: The court cannot wait a day.

Defendant Loicano: I never came to court and said, I don't want to get a lawyer, I can't get a lawyer. I have been present here, through all the hearings. Is that right, Mr. Tendy? Did I ever say I don't want to get a lawyer or couldn't get a lawyer? Only at the first hearing.

The Court: Please don't question Mr. Tendy. The Court is familiar with the prior orders, and if Mr. Cosentino is able to be here, you can be sure the Court will see to it that he is here.

Defendant Loicano: He wasn't too bad last night. Thank God for that.

The Court: In the meantime, Mr. Todaro is representing him. I advise you both to cooperate with him."

A little later during the second day of the trial the prosecutor reported back to the trial Judge about the investigation which the latter had ordered concerning the hospitalized attorney, Mr. Cosentino. The prosecutor said that Mr. Cosentino's own physician had advised that "As of now the clinical tests are negative. However, he indicates that in view of the fact that there is a past history of coronary occlusion, another several days may be required for him to definitely form an opinion" (232). Mr. Cosentino's physician had also advised "that he will coordinate and cooperate with whatever doctor is appointed by the Court in order to get the independent cardiologist's examination conducted at the earliest possible moment" (233).

At the outset of the third day of the trial (April 4, 1962) Mr. Todaro informed the Court that his three assigned defendants "are still not talking to me, • • • and I cannot speak for them" (306). At the end of that day Mr. Todaro advised the Court to the same effect and implored the Court to relieve him, citing his personal business necessities. The Court, however, would not promise to relieve Mr. Todaro even when the other lawyers for whom he was substituting on assignment by the Court should return, the Court saying "I will cross that bridge when I come to it" (620-621). The prosecutor then took it upon himself to urge the Court "to once again instruct these defendants to cooperate so that we will have as full a record for the future as is possible" (621). The Trial Judge instantly took up the prosecutor's cue—we are expectant that this Court will rule it to have been a miscue—and adjured the three defendants

sternly indeed, threatening them with "the maximum possible punishment available under the contempt statute" if they refused to cooperate with Mr. Todaro, "And you can be pretty sure that I will make it stick" (622). The three defendants, however, firmly but respectfully advised the Court that Mr. Todaro was not their lawyer and that they would not cooperate with him (622-624). The Court said "You had better" (622). Soon after this Mr. Todaro again entreated the Court to at least "consider some way whereby I can take off from time to time to take care of other matters. I have commitments which I must fulfill * * * In view of the fact that your Honor assigned me to unwilling clients, couldn't your Honor assign someone else to take over when I am away? Because they will never consent" (646). The Court refused this request, adducing as his ground for the refusal that the trial was only in its third day (646-647). As will appear, the Trial Judge never thereafter voluntarily found it fitting to relieve Mr. Todaro, even after the trial had gone on for many weeks and Messrs. Aronne (for the Panicos) and Cosentino (for Loicano) were back on the job. Mr. Todaro's rescue had to come, when it finally did, *via* a mandamus action in the Court of Appeals.

Meanwhile, the Trial Judge had instituted a form of surveillance of the absent attorneys, Messrs. Aronne and Cosentino, *i.e.*, checking up on Mr. Aronne's state court trial duties and on Mr. Cosentino's cardiac illness. See 232-233 (April 3, 1962, the second day of the trial); 723-724 (April 6, 1962, fourth day). See also, to similar effect, during the second week of the trial (April 11, 1962) (pp. 1354-1354a); and (April 12, 1962) pp. 1410-1411.

The next development (April 12, 1962) is of special importance. On the latter date, at the afternoon session, Mr. Aronne (the Panicos' attorney) appeared at the trial, his

state court matter having been almost concluded. There ensued a lengthy colloquy with the Trial Judge, Mr. Todaro being present, which is printed nearly in full in the appendix of Loicano filed herein, pp. 9a to 20a (Trial Minutes pp. 1420-1434). Although, as seen, the Court had apparently recognized the justice and the necessity of Mr. Aronne's absence when the matter was thoroughly gone into at the pre-trial session of March 29, 1962 (*supra*), the Trial Court greeted Mr. Aronne upon his return on April 12 in a quite altered mood. It is not difficult to surmise that the Trial Court was smarting under the consciousness of the fatal error which it had committed in choosing the ill-advised method which it did for dealing with the absence of Loicano's and the Panico defendants' counsel of their own choice. Mr. Aronne on April 12 was accordingly subjected by the Court to a thinly-veiled censure-lecture in the form of a "recapitulation of what the record in this case shows" (1420). See 1420-1424. When Mr. Aronne was allowed to reply, he began by noting that his state court trial was not quite over (1424), and when he again explained that he had only been playing a stop-gap role as the Panicos' attorney prior to the trial, the Court suddenly interrupted him to accuse him of "defrauding the Court" (1427-1428). Just how ridiculous this charge of fraud is may be seen by reading the minutes at pp. 1428-1430, where Mr. Aronne defended himself against the charge. There was further colloquy, in an attempt to thrash out the procedural problems created by Mr. Aronne's absence from the trial theretofore. The Trial Judge saw fit to conclude the colloquy by conveying to Mr. Todaro (who was also present) the wholly unexpected and disheartening news that he (Mr. Todaro) was not to be relieved from his assignment as counsel for Mr. Aronne's clients "Until I see that there is a proper transition here which protects the

rights of your clients" (1437). Thus, Loicano was to continue to be linked, through assigned co-counsel, and in the Jury's eyes, with the Panico defendants, and *vice versa*.

On the next day (April 13, 1962) Mr. Todaro advised the Court that Loicano was still rejecting his services as counsel (1547).

At the commencement of the trial day on April 16, 1962 Mr. Sylvester Cosentino, Loicano's retained attorney, appeared in the robing room before the Trial Judge, having been released from the hospital (1713-1727). *In the meantime, during Mr. Cosentino's absence and the non-participation of Mr. Todaro, the entire direct testimony of the accomplice witness Edward Lawton Smith which purported to inculpate Loicano in the conspiracy had been taken* (1485 *et seq.*). *Efforts to induce the prosecution to avoid going into this area were futile* (1544 *et seq.*). This was on April 12, 1962, a Thursday. It was already then officially expected that Mr. Cosentino would be back in Court on the following Monday, April 16 (1545). Nevertheless, Loicano's renewed entreaties for the Court to wait just this little while longer were brushed aside, even though Loicano pointed out to the Court that the forthcoming testimony of Smith was crucial for Loicano's fate, and that during the first trial Mr. Cosentino had closely cross-examined all of the witnesses "every time, like a name like Angelo was brought up, he always make it a point to get up and say, 'This is not the Angelo you are talking about' and all that kind of stuff" (1549).

Upon Mr. Cosentino's return as aforementioned on April 16, 1962, the following colloquy occurred (1713-1727):

> "Mr. Cosentino: Mr. Tendy called me on the telephone last Thursday and told me that your Honor

had ordered me into court. I told him I would be here.

On April 1, 1962, I suffered a heart attack. Fortunately, they found it was not a serious coronary. But they found I was suffering from high blood pressure.

I was placed into the Lenox Hill Hospital by Dr. Kossman and remained there until April 8th. Then I was sent home to rest for at least another week.

I was told to avoid excitement and tension and pressure. I feel that I cannot concentrate, and I feel I am mentally and physically unable to take part in this protracted trial.

I fear another attack or if my pressure goes up I fear a stroke.

Because of these personal reasons I am asking to be relieved as counsel for Loicano.

Furthermore, I feel I cannot do justice to my client in view of the fact that the trial has progressed for fully two weeks. I have not participated in the selection of the jury. Many witnesses have been called and now I am informed that Smith, the government's principal witness, has testified concerning my client.

I was not present, did not have an opportunity to make my proper objections, and those witnesses who have been excused I have not had the opportunity to cross examine.

Your Honor assigned George Todaro and also assigned him to the Panicos, and I feel that there is a conflict of interest. My client was not represented by counsel of his own choosing. My client did not accept the assigned counsel. I am given to understand that neither my client nor the counsel assigned by the Court took part in the selection of the jury and did not take part in the examination of witnesses who have already testified.

On behalf of my client, Angelo Loicano, I challenge the panel of jurors on the ground they were

illegally selected without my participation as retained counsel, and without participation of my client. I feel that my client's constitutional rights have been violated and that he did not have counsel of his own choosing and that to date he has not been represented by counsel of his own choosing.

Angelo Loicano retained me to represent him I prepared the case with my client. I was prepared to proceed until I was down with this attack. There are many facts in this trial that my client and I have discussed as attorney and client which was done in a confidential and privileged atmosphere of attorneys and client. George Todaro was pressed into this trial as counsel for Loicano without the defendant's consent and acceptance, and without time or opportunity on the part of Todaro to prepare Loicano's defense.

I was told that my client Loicano has refused to accept Todaro as his counsel on the ground he had retained me as his counsel. Under the circumstances, I feel that Mr. Todaro was not in a position to protect my client's rights.

The Court must bear in mind that the first trial ended in April, 1961, and since then I have been ready to proceed to trial. But the United States Attorney kept adjourning the trial from time to time for almost one year, and finally the trial was set for April 2nd. I suffered the attack and was taken to the hospital.

I feel in fairness to myself and my client that this trial should have been adjourned until such time as the Court could have ascertained whether I was able to proceed, but without waiting for a report as to my condition the Court ordered my client Loicano to trial and assigned an attorney not acceptable to him.

On behalf of my client Angelo Loicano, I move for a withdrawal of a juror and a declaration of a mistrial or, in the alternative, that he be granted a severance.

The Court: In making that motion are you appearing for Loicano this morning?

Mr. Consentino: I am. I was ordered in by your Honor, that is why I am here.

The Court: Either you are in the case or you are out, which is it?

Mr. Consentino: I would rather be out.

The Court: I am sure you would. If you are out, you cannot make motions.

Mr. Consentino: I am here to protect his rights if I can and to protect my own. I am making these applications based on the fact that if I am in, if your Honor orders me in, I have got to stay in. If your Honor relieves me, I am relieved, and I will get out."

* * * * *

"The Court: Was April 1st the first time you suffered a heart condition?

Mr. Cosentino: I did not know I had suffered a heart attack a year prior. I was very tired and went to the doctor and the doctor took a cardiogram.

The Court: When was this?

Mr. Cosentino: April 4, 1961.

The Court: So that over a year ago you had knowledge of the fact that you had a coronary condition.

Mr. Cosentino: Yes, but never suffered any ill effects. I was in perfect shape.

The Court: You applied to the Court at one of the pretrial sessions, when the Court said these sessions would run from ten to five, and at that time you advised the Court to the effect that you had a heart condition.

Mr. Cosentino: Yes.

The Court: Your client was also advised of that fact, was he not?

Mr. Cosentino: Yes.

The Court: During the last trial there were a

number of applications on your part to adjourn because of this condition?

Mr. Cosentino: Yes. Not a number, as to a couple of them. When I found out I had this condition, I didn't know what was happening, I was feeling weak and tired, and I told Judge Levet that I didn't know what was going on, and he suggested I see a doctor.

The Court: Did you make an attempt between the time of the close of the last trial and the opening of this one on April 2, 1962, to substitute other counsel in your place of Loicano?

Mr. Cosentino: I discussed it with him. I asked him, I said, 'I think you ought to get other counsel.'

He said, 'No, you have been paid. I think you should stay in it.'

I felt good, I had no problems of any kind. I led a normal life until this one occurred on Sunday, April 1st.

The Court: Under the circumstances, I cannot relieve you from your representing Loicano in this case, nor will I relieve Mr. Todaro in the event there is a recurrence of your condition, nor will I consent to your being absent from this trial.

Mr. Cosentino: Your Honor is denying me the right—

The Court: I deny your motions for a withdrawal of a juror and a mistrial.

Mr. Cosentino: You said you will not permit me to remain absent from the trial. I must from time to time go in for checkups for one day.

The Court: That is too bad. You cannot do it during this trial.

Mr. Cosentino: I think your Honor is being very unfair.

The Court: I am not. You went into this case with your eyes open, with a serious condition, or what you now claim to be a serious condition, and before I am through with it I intend to submit this situation to the Bar Association Grievance Commit-

tee. I don't think defendants are entitled to a built-in mistrial with this sort of thing, Mr. Cosentino.

Mr. Cosentino: I don't quite understand that statement.

The Court: It seems to me when a defendant knowingly takes a lawyer who has had this kind of a condition and the lawyer goes along with that, then he must stay in the case. You cannot have it both ways. Either you represent this man or you do not. If you do not want to represent him, if he can get other counsel to come in here at this time who will represent him and who will not delay this trial, the Court will certainly entertain an application. If you will consent to Mr. Todaro's continuing to represent him, that is fine.

Did you receive a fee?

Mr. Cosentino: Yes, I did.

The Court: The least thing you can do is turn over that fee to Mr. Todaro, who is representing Loicano.

Mr. Cosentino: If my client tells me to do that, I will. Todaro says he is not counsel, he has not been accepted, and Todaro said he will not participate or take part in this trial because he is not acceptable to my client.

The Court: I am certainly willing to entertain an application by you for the substitution of counsel at this stage of this case with your client's consent, and not otherwise. Otherwise, I cannot relieve you.

Mr. Cosentino: Then may I say this to your Honor. As I told you before, I must go, and this will not take me out of the trial for more than perhaps a half day. They have to keep me under constant check for my high blood pressure. I cannot get these doctors at night, Judge.

The Court: The Court will permit that only on condition that you have a signed consent of your client to have some other lawyer in this case represent him in your absence and the consent of the lawyer who is to represent him and his client's consent

as well. In other words, you may do it if you comply with the procedures the Court has set up to take care of coverage during the absence of counsel.

I also request you at this point to get such coverage from your client so that the Court can consider whether or not to relieve Mr. Todaro, who has been serving here without fee in the highest traditions of the Bar and representing your client to the very best of his ability, under all the circumstances, during your client's deliberate lack of cooperation.

Mr. Cosentino: My client felt he had retained counsel, and he shouldn't have assigned counsel, he should have his own attorney.

This trial was delayed a whole year, Judge. Another few days to find out what my condition was wouldn't—

The Court: The Court took the trouble of ascertaining your condition and did ascertain it before I assigned Mr. Todaro. We were advised by your doctor that in all probability it would require at least a week in the hospital and a week's rest. The Court also had another doctor verify that.

Mr. Cosentino: I am not quarreling with that. And then I said that if it could have been adjourned for two weeks, I would be here today.

The Court: It couldn't be adjourned for two weeks. There has been one delay after another in this case.

Mr. Cosentino: It wasn't wilful. I was here every day in the last trial."

* * * * * *

"The Court: * * * I want to advise you, Mr. Cosentino, that at your request the Court will recall any witness you wish to cross-examine, I will give you the right to make an opening statement at the opening of the defense, and if you have any motions you wish to make, I will entertain them, or any other relief that you feel you are entitled to in the way of further examination of any witness, and so on.

Mr. Cosentino: I feel this way at this time, your Honor: that those witnesses that have been called, if they are now to be recalled, anything that I may do would be of no effect, it would lose its effect on the jury, and therefore I feel that it would be a nullity on my part to request that these witnesses be recalled so that I can examine them.

The Court: I thought that is probably the way you would feel, but I am directing you that if you feel that there is a need to cross-examine them, you will advise the Court and the Court will recall any witness who has been on the stand.

I also advise the United States attorney to make available to you a complete copy of the transcript so far, and I advise you that there are copies in the office of the Legal Aid Society downstairs in the court house, and if that doesn't satisfy you, you are at liberty to use the Court's copy in the anteroom of my chambers at any time you see fit.

Mr. Cosentino: Thank you."

The above quoted colloquy shows that despite Mr. Cosentino's return the Court compelled Mr. Todaro to continue also as Loicano's attorney, even though Loicano still did not want his services. For further items on this Cosentino-Todaro phase see 1735, 1741-1743, 1744-1746, 1766-1768. See also (April 18, 1962) page 1896, where, Mr. Aronne having been detained in an appearance before Judge Leibowitz for some 10 minutes, the Trial Judge herein instantly ordered Mr. Todaro to "carry out your assignment this morning," i.e., to represent the Panico defendants. Thereupon came a new outburst from Salvatore Panico, "He is not representing me, Mr. Aronne is. Can't the Court wait a few minutes until Mr. Aronne gets here?". A similar outburst occurred, for the same reason, a little later that morning (1937). Later that day this same situation resulted in an acrimonious address by the Court to Mr. Todaro, whom he threatened

with contempt; in this incident the Court further displayed its previously noted inconsiderateness concerning Mr. Cosentino's health (1994-2004). And see especially pp. 2002-2004 for Mr. Aronne's perfectly reasonable explanation of his brief tardiness earlier that day.

On May 3, 1962, after having held Mr. Todaro in this trial as unwilling assigned counsel for unwilling defendants over a period of more than one month, during the greater part of which Mr. Todaro had been obligated merely to stand by even though regular counsel had returned to their duties, the Trial Judge finally released Mr. Todaro—or, rather, the Trial Judge bowed to the inevitable, namely, the action which the Court below was indicatedly about to take on Mr. Todaro's behalf in the mandamus proceeding brought by him for the purpose of obtaining his release. See 3516-3520, 3574-3583.

5. The Findings and Rulings of the Court of Appeals on the Issues Relating Immediately to the Case of Loicano.

We limit our description of the decision of the Court of Appeals in the manner indicated in the above heading in order to avoid unnecessary duplication of the companion petitions in which the rulings of that Court affecting various questions of the fairness of the trial as a whole are treated, and we respectfully adopt such treatment in the companion petitions.

The opinion of the Court below, in describing Smith's testimony about Mancino's deliveries of narcotics, in the absence of Smith, to "Rocco On The Hill", correctly refrains from inculpating Loicano in this "route-stop"; and it describes Smith's testimony about meeting Sancinella and "his partner, Puggy", at which time Sancinella and

Loicano allegedly made their "offers" to Smith to have him run narcotics for them to Canada (App. C. Panico Pet. 7a-8a).

In passing on the sufficiency of the proof of conspiracy, the Court below lumped together Loicano with other appellants as to whom the Court said that "There was abundant evidence that [they] were part of a conspiracy to import and deliver narcotic drugs" (*id.* 16a). Specifically as to Loicano, this supposed evidence of participation in the conspiracy is recited by the Court below as follows (*id.* 20a-21a):

> "Loicano was introduced to Smith as a 'partner' of 'Rocco, up the hill' (Sancinella) in Sancinella's presence. At this meeting at a bar in Brooklyn, Sancinella asked Smith if he would be willing to 'make some runs back and forth to Canada for him and his partner Puggy (Loicano.)' When Smith declined the offer, it was Loicano who suggested that he could make $100,000 to $140,000 a year as a courier and told Smith to think it over. Smith testified that a number of deliveries were made to Sancinella. Loicano contends that the conversation with Smith was not in furtherance of the conspiracy charged but was an attempt to form a new conspiracy. We disagree. Sancinella and Loicano were engaged in an effort to recruit Smith as a courier to carry narcotics from Canada. They sought to have him join the existing conspiracy as an integral part of it and not to go into competition with the old conspiracy. This is made abundantly clear by Mancino's efforts on behalf of Sancinella and Loicano to employ Smith. Mancino was the strong thread running through this entire conspiracy. This evidence against Loicano demonstrates the requisite knowledge of the conspiracy and a transaction with its members from which it would be reasonable to infer an intent to participate in it."

The findings and rulings of the Court below on the issue of Loicano's right to counsel (*id.* 35a-41a) are noted *infra* under our "Reasons For Granting The Writ."

Reasons for Granting the Writ

1. We submit that this is a literal "no-evidence" case within the meaning of *Thompson* v. *Louisville*, 362 U. S. 199; and see 80 A.L.R. 2d 1368. The main and simple reason for granting certiorari to petitioner Angelo Loicano is to right the injustice which has befallen this man. We know that this Court rarely can turn its busy attentions to the correction of trial errors, but the Court's "no evidence" doctrine expresses its readiness to step in for the redress of sheer probative outrage. This Court is Loicano's last and only hope for saving him from a governmental act of arbitrariness done under the mask of "due" process. Angelo Loicano is fifty years of age; a twenty year prison sentence is tantamount for him to a sentence of death. And this on what proof of guilt? On the base word of a paid informer who, forsooth, did not even implicate Loicano in one single sector or thread of either the operations of the indictment-charged conspiracy or of its formation, but who at most has Loicano showing knowledge of the existence of the conspiracy as an already established enterprise and as making overtures to Smith to enter a rival conspiracy.*

* We may flatly state that the opinion below errs in stating that Sancinella and Loicano were trying to have Smith "join the existing conspiracy as an integral part of it and not to go into competition with the old conspiracy". We are sincerely unable to comprehend this statement in the opinion because we had thought it was absolutely established by Smith's own testimony, as one of the prime building-blocks of the Government's case against *all* of the co-conspirators, that he was already theretofore engaging in courier work in the existing conspiracy.

Indeed the alleged Loicano overture was not even so much as a separate conspiracy, for it was never consummated even at the "conspiracy" threshhold (the "meeting of the minds") in view of Smith's self-declared declination of the alleged "offer".

The Government has conceded, as we noted, that Loicano was the single defendant in this trial as to whom possession of narcotics was not proved. This amounts to a concession that there was no proof of Loicano's alleged involvement in the "route-stop" known as "Rocco's On The Hill". And the Court below has properly refrained from adducing this branch of the case to support the conviction of Loicano. Atmospherically and by emanations of associative guilt, the supposed connection of Loicano with "Rocco's On The Hill" was nevertheless played to the hilt by the Government at the trial and in the appeal; and it is dangled tendentiously in one or two places even in the opinion of the Court below. Yet the sole even merely associative link between Loicano and "Rocco's On The Hill", according to the Government's contentions, is that Sancinella (or someone?) introduced "Puggy" to Smith as his "partner". As a matter of fact, Smith said not even that it was Sancinella, but Mancino (Smith's associate) who characterized "Puggy" as "Rocco's" partner (1556-1558). It was not "Rocco", then, who was claiming Loicano as his "partner", nor *vice versa*, but it was a third party who was bruiting this alleged link. Moreover, not only is there no proof that this was a "partnership" in "Rocco's On The Hill", but there is no proof as to what the purpose or subject matter, if any, of this alleged "partnership" was. The only reasonable inference is that it was a "partnership" for the tendering of the alleged "offer" to Smith to start a new conspiracy.

But this alleged new and separate conspiracy is not the conspiracy charged in the present indictment. Thus, Loicano is convicted and sentenced to twenty years in prison on proof which, at most, establishes that he had heard about the conspiracy which is alleged in this indictment and that he tried, *unsuccessfully*, to help start a separate and rival conspiracy. Not only, therefore, is Loicano innocent of the conspiracy charged in this indictment; he is innocent of any *crime* of conspiracy whatever, for an abortive effort to conspire is not the crime of conspiracy. Barely a quarter of a year before the Court below decided this case, another panel of the same Court recognized this last-mentioned principle in throwing out a narcotics conspiracy charge on immeasurably stronger "proofs" in *United States* v. *Cianchetti*, 315 F. 2d 584, 588.

How was it possible for this conviction and this twenty-year sentence of Loicano to come to pass on such a "trial record"? It was possible only because of the inherently unfair potentialities of the mass conspiracy device, and because in this particular mass conspiracy trial the Judge, it must be said, lost his grip upon his judicial self, as evidenced by all of those myriad unjudicial deeds and words of the Judge with which this record so shockingly abounds.

The case, we submit, is one of "no-evidence." It also is a classic one for the exercise of this Court's power to preserve the proper and fair administration of Federal criminal justice; and for the exercise also of its power to intercede when a Court of Appeals has so far sanctioned a departure from the usual course of judicial proceedings by the lower court as to justify this Court's intercession. As we said at the outset of these "reasons", the case is a compelling one for the exercise of this Court's high power to

right a dreadful judicial wrong against the liberty of an individual and against due process of law.

2. The Trial Court's unreasonable and arbitrary refusal to grant a short adjournment of the trial for the convalescence of Mr. Cosentino resulted in Loicano's being not only without counsel of his choice but in effect without any counsel during vital parts of the trial proceedings over a period of some two weeks. The Court below, after commenting on the deeds or alleged misdeeds of other defendants in regard to their efforts to obtain counsel—none of which was true in Loicano's case—describes the situation on the first morning of the trial as follows (App. C. Panico Pet. 38a).

> "Defense counsel on this first morning were also in the process of substituting counsel for a number of defendants. When all the switches had been made, George Todaro, Esq., ended up relieved of his representation of other clients. The trial court assigned him to represent the two Panicos and Loicano until such time as their retained counsel returned or they obtained other counsel. Later, the court directed the prosecution not to put in evidence directly relating to these defendants until their retained counsel returned. Accordingly, the testimony through April 11th dealt primarily with the substantive counts and did not directly involve the Panicos or Loicano. Mr. Aronne returned on April 11th and the Judge afforded him an opportunity to review the existing trial record and make any motions on behalf of the Panicos, or recall any witnesses for further cross-examination. He also offered Mr. Aronne the opportunity to make an opening address on behalf of the Panicos after the Government rested, despite their explicit waiver of an opening. Mr. Cosentino returned on April 16th and the same opportunities were made available to him. From April 11th, when testimony

concerning Loicano began, to April 16th, Mr. Todaro was representing only Loicano. * * * "

The opinion of the Court below then recites the familiar authorities on the Sixth Amendment right to a reasonable opportunity to secure counsel of one's own choice and on the limitations of that right when the right is used obstructively (*id.* 39a). The opinion then continues with a doctrinal declaration which can have no discernible bearing on the case of Loicano—" * * * if a defendant does not give the Court adequate notice that his retained counsel will be unable to attend the trial, the trial court may, in the exercise of its sound discretion do what is reasonably necessary to meet the situation * * * (*ibid*). The opinion further states (*id.* 40a-41a):

> "We find that the judge acted reasonably in the circumstances. The delay that would have been caused by acceding to the Pahicos' vacillating desire to have Mr. Aronne represent them at trial, and Loicano's insistence on Mr. Cosentino's services despite the knowledge of his heart condition and the fact that this condition had caused repeated motions for adjournments in the first trial is precisely the kind of obstruction which the right to counse of one's own choice must not be allowed to produce. * * * The steps taken by the court during retained counsel's absence and the opportunities made available to them on their return fully protected the rights of these appellants.
>
> These three appellants, relying on Glasser v. United States, 315 U.S. 60 (1942), also contend that the appointment of Mr. Todaro to represent all three denied them the effective assistance of counsel. This claim is baseless. * * * An appellant must show some conflict of interest between himself and the other defendants represented by his attorney before he can claim successfully that the joint representation de-

> "prived him of his right to counsel. * * * As noted above, Mr. Todaro represented these three appellants during a part of the trial in which no significant evidence was introduced against any of them. In compliance with the court's instructions, the prosecution put in evidence relating only to the substantive counts in which none of them were named. No conflict of interest is pointed to by appellants and none is apparent to us."

As regards the above intimation in the opinion of the Court below that Mr. Cosentino's heart condition had troubled the efficient progress of the first trial, we are obliged to note that this is incorrect, because it does not reflect the altogether minor extent to which Mr. Cosentino's health had been a problem in that trial at all. As we noted earlier, Mr. Cosentino was present or "covered" at every single one of the pretrial proceedings for the second trial. We also saw earlier that the record shows Loicano to have been as surprised as everyone else by Mr. Cosentino's failure to appear on the morning of April 2, 1962.

It is strange to learn, as part of the jurisprudence of the Sixth Amendment right to counsel, that a defendant is obliged to keep available a sort of second team of attorneys on the chance that his first team may be eliminated by recurrence of an illness which had not theretofore prevented the diligent performance by that very same first-team counsel in this very same case in the prior lengthy trial as well as in the then quite recent pretrial proceedings for the second trial. This suggestion in the opinion of the Court below seems but a more politely worded version of the trial Court's suggestion that Loicano had deliberately planned to provoke a Sixth Amendment issue for himself by retaining counsel with a "built in" heart condition.

As regards the further suggestion in the opinion of the Court below that Mr. Cosentino was given the opportunity to go back over the ground which he had missed during his illness, the simple answer is that counsel had to make a choice, in his client's interest, as to whether to subject the jury once again, over a period which must necessarily have taken several days, to the influence of a prosecution witness (Smith) whom the defense (rightly or wrongly, but sincerely) regarded as possessing both the slipperiness and the venomousness of a poisonous snake. To which may be added also the factor of counsel's concern lest the jury be antagonized against Loicano by being subjected to the sheer fatigue and boredom of a re-enactment of the testimony of Edward Lawton Smith plus a whole new cross-examination. In any event, the Court below has cited no authority for its implied proposition that when a violation of the constitutional right to counsel has lodged, especially in the setting of a protracted and complicated criminal trial like this one, the harm can be effectively and fully undone by *any* supplemental or corrective procedures; nor are we aware of any authority either way on this question.

The Court below also errs, factually, as to how much of the case went in during Mr. Cosentino's absence, and as to how significant this was. As seen, Smith's entire direct testimony against Loicano went in; the testimony on the substantive Counts which also went in was in itself quite possibly fatal because it was the Government's sole basis for introducing the prodigious quantities of the seized "Orlandino" narcotics. Nor did Loicano have counsel's protection in choosing a jury, or in countering the Government's opening to the jury.

The opinion also misconceives the record facts concerning Mr. Todaro's status on the morning of April 2. On that morning Mr. Todaro had not merely "ended up re-

lieved of his representation of other clients", as the Court has expressed it, but he was out of the case entirely and was actually physically moving out of the courtroom when Judge MacMahon "nabbed" him. The situation, in other words, was not that Loicano had available to him a handy, substitute lawyer who was part of some kind of "pool" of attorneys, as it were, but that Loicano had thrust upon him an unwilling lawyer arbitrarily drafted by the Court.

The opinion also does not give a correct impression of what the record shows to have been the situation between April 11, when Mr. Aronne (the Panicos' counsel) returned, and April 16, when Mr. Cosentino (Loicano's counsel) returned. The opinion apparently overlooks the important fact that Mr. Todaro, between April 11 and April 16, was still under Judge MacMahon's orders to hold himself present at the trial as a sort of continuing backstop counsel for the Panicos and not only as assigned counsel for Loicano. And indeed even after April 16 this peculiar status of Mr. Todaro continued to be enforced by Judge MacMahon for both the Panicos and Loicano.

In June of this year the Sixth Circuit rendered a decision on the question of a defendant's right to a reasonable opportunity to obtain counsel of his own choice when his priorly retained counsel becomes unexpectedly and suddenly unavailable. *United States* v. *Johnston*, 318 F. 2d 288. Because the facts in the *Johnston* case are strikingly suggestive of those in the instant case (our facts, however, being much stronger), and because the Court's decision in *Johnston* is in such striking contrast with that of the Court below, we think that the interests of petitioner Loicano justify our quoting the entire relevant portion of the *Johnston* opinion—even though thereby we further lengthen this already lengthy Petition (318 F. 2d at 289-291):

"A few days after the indictments were returned appellant Balk retained as counsel Mr. Joseph W. Louisell, who was entered attorney of record on May 27, 1959. This action on the part of Mr. Louisell was done by Mr. Ivan E. Barris, his associate. More than two years thereafter, during which time nothing had been done in the case, a motion for a joinder of the cases for trial was filed and a hearing had on August 21, 1961. The motion was granted. Mr. Barris appeared for this appellant on that occasion. Then, on September 12, 1961, a pre-trial was had, Mr. Barris appearing for appellant Balk. The trial date was set for September 26, 1961, but the date the assignment was made does not appear. On the trial date, which was in the afternoon of September 26, 1961, Mr. Louisell and Mr. Barris appeared in court, appellant Balk being present, and Mr. Louisell made a statement to the Court revealing these facts and circumstances:

Mr. Louisell informed the District Judge that he had an imperative commitment to prepare an important case in the Michigan Supreme Court which was scheduled for argument on the first of October, 1961. For this reason he asked to be excused. He informed the court that his associate, Mr. Barris, had collaborated with him in every case he had handled during the past eight years; that Mr. Barris had appeared for appellant Balk at the hearing of the motion for consolidation of the cases and at the pre-trial conference; that Mr. Balk knew about these appearances by Mr. Barris and had been in communication with him about the case since the middle of August on up 'until the other day.'. Mr. Louisell further said that Mr. Barris was prepared to proceed with the trial and 'thoroughly conversant' with the indictment.

Mr. Louisell further informed the Court that some several weeks prior to that date he had 'bumped into Mr. Balk' and, according to his recollection, advised

Mr. Balk that he could not be present at the trial if it was heard on September 26, the date the case had been set for trial. [This statement by Mr. Louisell, later denied by Mr. Balk, appears to have been casual and somewhat indefinite. A defendant in a criminal case cannot be denied his consitutional right on hazy testimony.]

Mr. Louisell informed the Court that he had talked with Mr. Balk on the previous Friday, September 22, and Mr. Louisell had informed Mr. Balk that he could not appear for him at the trial and that Mr. Barris would try the case for him. He informed Mr. Balk that Mr. Barris was in position to and could give him the 'very best of representation in the matter.' At that time Mr. Balk made no objection to Mr. Barris trying the case. Mr. Balk asked to come to Mr. Louisell's office on that Friday afternoon but Mr. Louisell said he preferred Monday morning.

In the early part of Monday morning Mr. Balk came to Mr. Louisell's office and advised him, *for the first time*, that he was not content with having Mr. Barris represent him. Mr. Balk also said that he had confidence in Mr. Louisell; had retained him and expected him to represent him. After a review of the situation by Mr. Louisell, Mr. Balk said he 'had a mind another counsel.' Mr. Louisell informed Mr. Balk that if it were his choice to have other counsel he would cooperate in every way in making available to such other counsel the benefit of both Mr. Barris' and his research in preparation of the case for trial. Mr. Louisell said that he encouraged Mr. Balk to keep Mr. Barris as he was the best prepared to try the case but did suggest to Mr. Balk the name of another attorney [Mr. Fred Walker], who had a 'great wealth of experience here in Federal Court.' Mr. Balk suggested that Mr. Louisell get in touch with this attorney and this Mr. Louisell did and received from him, Mr. Walker, a commitment to appear and represent Mr. Balk. Mr.

Louisell further stated that he told Mr. Balk that Mr. Walker would represent him, Mr. Balk said he 'did not want that other counsel' and insisted on having Mr. Louisell present. The District Judge then observed that he knew Mr. Barris and had always found his work to be extremely competent.

Mr. Balk then told the District Judge that he did not know Mr. Barris was involved, that he thought Mr. Louisell was going to handle the case for him and did not know until Friday that Mr. Louisell wasn't able to handle the case. He said he went out the previous Friday to get another lawyer and that some of the lawyers he contacted told him that it would be impossible for them to handle the case because there was not time to prepare for trial and the others he saw were busy and they couldn't represent him. He said that he had confidence in Mr. Louisell, but did not know Mr. Barris very well and that he felt like he should have opportunity to get a lawyer 'I have confidence in.'

The District Judge asked the United States Attorney to state his position and the reply was that a great many witnesses had been subpoenaed, in Canada and from many states in the United States, that some of them were there and some of them on the way. Thereupon the District Judge spoke of the competency of Mr. Barris in the case and said in view of all the circumstances he would excuse Mr. Louisell and the case would proceed with Mr. Barris as counsel for appellant Balk.

The trial went forward, lasted four days, and resulted in the conviction as above set out.

No question is made concerning the competency of Mr. Barris or his manner of conducting the trial.

The statements and colloquy occurring in court have been recited in some detail because the constitutional question presented by appellant Balk is quite disturbing.

Stripped of unnecessary words, the Sixth Amendment reads:

'In all criminal prosecutions, the accused shall enjoy * * * the Assistance of Counsel for his defense.'

Most of the cases concerning this portion of the Sixth Amendment involve the appointment of counsel for indigent criminal defendants. Many cases arise directly under the Sixth Amendment and many others under the Fourteenth Amendment relative to counsel for indigent defendants in state courts. None of these cases are of particular help in resolving the question.

It has been said that the first eight amendments and the Fourteenth Amendment are 'essential barriers against arbitrary or unjust depravation of human rights.' Judge Learned Hand said in a lecture at Harvard that these amendments are ' * * * generally regarded as embodying the same political postulates that had been foreshadowed though not fully articulated in the exordium of the Declaration of Independence; "self-evident" and "unalienable rights" with which all men "are endowed by their Creator" and among which are "life, liberty and the pursuit of happiness." '

(1) So, it would seem that the 'unalienable rights' of life and liberty of a defendant in a criminal case are carefully safeguarded by the Sixth Amendment. In the portion of the Amendment we are considering, it is evident that the protection given to a criminal defendant is the adequate assistance of counsel whereby he will have a full, fair trial under the law. In other words, have his 'day in court.'

(2) The Amendment does not concern itself with who the counsel may be or how the counsel may be selected. But if a defendant in a criminal case desires to hire his own counsel, in order that the object of

the Sixth Amendment be met, such defendant must have fair opportunity and reasonable time to employ counsel of his own choosing. Crooker v. California, 357 U.S. 433, 439, 78 S.Ct. 1287, 2 L.Ed.2d 1448 (1958); Chandler v. Fretag, 348 U.S. 3, 9, 10, 75 S.Ct. 1, 99 L. Ed, 4 (1954); Glasser v. United States, 315 U.S. 60, 70, 62 S.Ct, 457, 86 L.Ed. 680 (1942); Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed, 158 (1932).

Therefore, the question boils down to whether appellant Balk had fair opportunity and reasonable time to select counsel of his own choice.

While the history of the case heretofore set out indicates that appellant Baik wavered to some extent as to whether he might go forward with Mr. Barris or accept Mr. Walker, we believe that the record fairly reveals that the definite position of Mr. Balk was that he desired Mr. Louisell to try his case and, if not, that he should have more time to select a lawyer that he had confidence in.

(3) We are fully cognizant of the situation in which the District Judge was placed. He had to make a decision on short notice. The United States had gone to great expense and trouble in assembling witnesses from long distances and the District Judge felt, which we are sure is true, that Mr. Barris could adequately protect the interest of appellant Balk. Actually it seems to us that appellant Balk was not prejudiced by the action of the District Judge in this respect, but this situation does not satisfy appellant Balk's rights under the Sixth Amendment. Crooker v. California, supra; Chandler v. Fretag, supra; Glasser v. United States, supra; Powell v. Alabama, supra; Releford v. United States, 9 Cir., 288 F.2d 298, 301 (1961).

(4) The weekend, from Friday until Tuesday, was not a reasonably sufficient time to give appellant Balk

> fair opportunity to select and employ counsel of his own choosing. We, therefore, rule that appellant Balk was deprived of a fair opportunity and a reasonable time to select his own counsel."

The opinion of the Court below also states, as seen, that as regards Loicano's objection of having been denied the effective assistance of counsel through being forced to accept assigned counsel who was also assigned to other defendants, "No conflict of interests is pointed to by appellants and none is apparent to us." The fact is, however, that such conflict of interests was pointed to both in the Panicos' and in Loicano's briefs in the appeal below. See the Panicos' main brief in the Court below at pp. 52-53. In Loicano's main brief in the Court below (p. 12) the conflict of interests was noted without elaboration. In his reply brief in the Court below he urged that the prejudice which resulted to him from this unwanted linkage which raised in the Jury's eyes an impression of obstructionism on the part of defendants was the more severe by reason of the extraordinary conduct of Salvatore Panico at the trial. In his petition for a rehearing in the Court below Loicano aided that the prejudice was heightened in that both the Panicos and Loicano were allegedly "route" defendants and hence the Jury would naturally tend to infer confirmation of the guilt of each of the respective "route" defendants from seeing them thus linked together in the courtroom. However, the main answer to this item of "conflict of interests" as formulated in the opinion below is that such conflict, in the anomalous circumstances of this case where the jointly assigned attorney was not performing *any* function of counselship, must have and could have inhered only in the sheer circumstance of the acrimonious linkage in and of itself, rather than in an actual operational conflict of interests on the part of the attorney in trying actively to serve the re-

spective causes of clients whose interests were in conflict. The enforced linkage of Loiacano with the high-strung Panicos through the virtually punitive "assignment" of joint "counsel" was intrinsically improper, inevitably productive of prejudicial odium in the jurors' minds against these defendants, and a denial of their Sixth Amendment right to adequate and effective counsel within the essential meaning of *Glasser* v. *United States*, 350 U.S. 60.

We take it that under the canon of the *Glasser* case, *supra*, and of the innumerable other "Sixth Amendment" decisions of this Court (including those decided within the very week in which this petition is filed), this Court's continuing concern for the preservation of the Sixth Amendment right to counsel renders certiorari appropriate whenever, as we claim has here occurred, the essential substance of that right has been abridged.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted. We respectfully join also, *mutatis mutandis*, in the suggestion made in the "Conclusion" of the Carmine Panico petition herein that if the petition of Salvatore Panico pending in No. 633 (the contempt case) is granted, an ultimately just and final determination as to the legality of the conviction of the particular defendants who were so inextricably linked with Salvatore Panico at the trial—viz., Carmine Panico and Angelo Loicano—may have to be postponed until after Salvatore Panico shall have had a new hearing as to his mental competency.

Petitioner Loicano also respectfully adopts, insofar as applicable to his case, the grounds for certiorari presented in the companion petitions, as well as the points of argument which are presented in those companion petitions on those of the "Questions Presented" which Loicano has herein raised but has either not argued or has not fully argued.

Respectfully submitted,

SYLVESTER COSENTINO,
Attorney for Petitioner Angelo Loicano.

[Appendix follows]

APPENDIX

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of June one thousand nine hundred and sixty-three.

Present:

HON. LEONARD P. MOORE,
HON. J. JOSEPH SMITH,
HON. PAUL R. HAYS,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIAM BENTVENA, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of conviction of

said District Court of appellants Bentvena, Monastersky and Struzzieri as to the substantive and conspiracy counts be and they hereby are reversed, and that the action as to said appellants be and it hereby is remanded for a new trial as to the substantive counts in accordance with the opinion of this court.

It is further ordered, adjudged and decreed that the judgment of conviction of appellant Salvatore Panico on the conspiracy count be and it hereby is reversed and that the action be and it hereby is remanded for a new trial in accordance with the opinion of this court.

It is further ordered, adjudged and decreed that the judgments of conviction of all other appellants be and they hereby are affirmed.

A. DANIEL FUSARO

Clerk

By VINCENT A. CARLIN

Chief Deputy Clerk